

ESTATE OF IRENE THERESA SHOOTS ANOTHER BUTTERFLY

IBIA 88-20

Decided September 20, 1988

Appeal from an order after reopening issued by Administrative Law Judge Keith L. Burrowes in Indian Probate IP BI 467A 84-1.

Affirmed in part; remanded in part.

1. Indian Probate: Adoption: Generally

For purposes of Indian probate proceedings, the Act of July 8, 1940, ch. 555, 54 Stat. 746 (25 U.S.C. § 372a (1982)), confirmed adoptions recognized by the Department of the Interior prior to the effective date of the statute, without regard to whether they were adoptions by Indian custom.

2. Indian Probate: Adoption: Generally

Testimony concerning Indian custom adoption or the intent of a decedent concerning an adoption is not admissible in Indian probate proceedings to attack the written record of an adoption which is in conformity with 25 U.S.C. § 372a (1982). However, evidence concerning the authenticity of the written record is admissible.

APPEARANCES: Sandra K. Watts, Esq., Great Falls, Montana, for appellants; Larry D. Epstein, Esq., Cut Bank, Montana, for appellees.

OPINION BY ADMINISTRATIVE JUDGE VOGT

Appellants Clarence Peter Butterfly, Carmelita Mary Butterfly, Earl Leonard Butterfly, Jr., Lolita Jean Butterfly, William Butterfly, James Mark Butterfly, Jamie Marie Butterfly, Ronald Lee Butterfly and Ramona F. Butterfly seek review of a January 13, 1988, order after reopening issued by Administrative Law Judge Keith L. Burrowes in the estate of Irene Theresa Shoots Another Butterfly (decedent). For the reasons discussed below, the Board affirms that order in part and remands the case for further proceedings.

Background

Decedent, Blackfeet Allottee No. 500, was born on August 1, 1899, and died intestate on August 24, 1983, at Browning, Montana. She was survived by one natural son, appellant Clarence Peter Butterfly, and nine children of a predeceased natural son, Earl Leonard Butterfly, eight of whom are appellants here. ^{1/} She was also survived by William Joseph Weatherwax, Joseph Peter Weatherwax, and Elizabeth Weatherwax Vernwald (Weatherwaxes), appellees here, whose status as the adopted children of decedent is the subject of this appeal.

The Weatherwaxes are the natural children of Agnes Butterfly, the sister of decedent's husband, Peter. In April 1935, decedent, Peter, and Agnes executed a Bureau of Indian Affairs (BIA) form document which, as executed, provided in full as follows:

FORMS FOR ADOPTION

The undersigned, Peter Butterfly and Irene Butterfly of the Blackfeet Indian Reservation, Montana, desiring to adopt William Weather Wax, Joseph P. Weather Wax, and Elizabeth Weather Wax, minors born on or about 1-20-22, 1-28-28 and 1-1-33 Respectively do by these presents agree to adopt said minors and the undersigned Agnes Butterfly Day Rider parent or natural guardian of said minors do by these presents hereby consent to the adoption of said minors by the said party of the first herein above named.

Witness

/s/ Peter Butterfly

/s/ Irene Butterfly

Adoptive parents

/s/ Agnes Butterfly

Parents or natural guardian

The foregoing adoption is hereby acknowledged this 24th day of April 1935.

/s/ J.H. Brott

Acting Superintendent

Judge Burrowes held a hearing to probate decedent's trust estate on September 11, 1984, at Browning, Montana. On November 30, 1984, he issued an order determining heirs, in which he found that the Weatherwaxes were the adopted children of decedent and therefore her heirs pursuant to 25 U.S.C.

^{1/} The ninth child is Faye Marie Burd.

§ 372a (1982). 2/ Appellants filed a petition for rehearing, alleging the existence of new witnesses who could show there was no adoption. Judge Burrowes denied the petition on May 15, 1985, for failure to comply with the requirements of 43 CFR 4.241. 3/

Appellants, now represented by a new attorney, filed another petition, requesting either rehearing or supplementation of the record. Judge Burrowes treated the petition as a petition for reopening under 43 CFR 4.242 and granted reopening. A hearing on reopening was held on August 29, 1985, at which both appellants and appellees were represented by counsel. At the hearing, Judge Burrowes declined to admit testimony offered by appellants concerning decedent's intent to adopt the Weatherwaxes and

2/ This section, derived from the Act of July 8, 1940, ch. 555, 54 Stat. 746, provides in relevant part:

"In probate matters under the exclusive jurisdiction of the Secretary of the Interior, no person shall be recognized as an heir of a deceased Indian by virtue of an adoption--

"(1) Unless such adoption shall have been--

"(a) by a judgment or decree of a State court;

"(b) by a judgment or decree of an Indian court;

"(c) by a written adoption approved by the superintendent of the agency having jurisdiction over the tribe of which either the adopted child or the adoptive parent is a member, and duly recorded in a book kept by the superintendent for that purpose; or

"(d) by an adoption in accordance with a procedure established by the tribal authority, recognized by the Department of the Interior, of the tribe either of the adopted child or the adoptive parent, and duly recorded in a book kept by the tribe for that purpose; or

"(2) Unless such adoption shall have been recognized by the Department of the Interior prior to the effective date of this section or in the distribution of the estate of an Indian who has died prior to that date: Provided, That an adoption by Indian custom made prior to the effective date of this section may be made valid by recordation with the superintendent if both the adopted child and the adoptive parent are still living, if the adoptive parent requests that the adoption be recorded, and if the adopted child is an adult and makes such a request or the superintendent on behalf of a minor child approves of the recordation."

All further references to the United States Code are to the 1982 edition.

3/ 43 CFR 4.241(a) provides in relevant part:

"Any person aggrieved by the decision of the administrative law judge may, within 60 days after the date on which notice of the decision is mailed to the interested parties, file with the Superintendent a written petition for rehearing. Such a petition must be under oath and must state specifically and concisely the grounds upon which it is based. If the petition is based upon newly-discovered evidence, it shall be accompanied by affidavits of witnesses stating fully what the new testimony is to be. It shall also state justifiable reasons for the failure to discover and present that evidence, tendered as new, at the hearings held prior to the issuance of the decision."

concerning the existence of Indian custom adoption on the Blackfeet Reservation. Both appellants and appellees submitted post-hearing briefs discussing the validity of decedent's adoption of the Weatherwaxes under 25 U.S.C. § 372a. Appellants argued, inter alia, that the only pre-1940 adoptions validated by § 372a were Indian custom adoptions.

In his order after reopening, Judge Burrowes affirmed his initial determination that decedent's adoption of the Weatherwaxes was valid under 25 U.S.C. § 372a. He noted that Clarence Butterfly, testifying at the August 3, 1970, probate hearing for decedent's husband, Peter Daniel Butterfly, had verified his father's adoption of the Weatherwaxes. The Judge further noted that the Weatherwaxes had been found to be heirs of Peter Butterfly in a January 28, 1971, order determining heirs, and that neither decedent nor Peter's two natural children had challenged the order.

Judge Burrowes stated that he believed the BIA practice in "recognizing" adoptions prior to the enactment of § 372a in 1940 had not been uniform and had not in all cases depended upon the existence of an Indian custom adoption. He found that the April 24, 1935, BIA adoption document constituted recognition of decedent's adoption of the Weatherwaxes within the meaning of § 372a.

The Judge further found that the Blackfeet Tribe had a custom for the adoption of children, which was satisfied by decedent and her husband Peter when they took in the Weatherwaxes.

Appellants filed a notice of appeal of Judge Burrowes' order after reopening, which was received by the Board on March 14, 1988. Both appellants and appellees filed briefs on appeal.

Discussion and Conclusions

On appeal to the Board, appellants argue: (1) 25 U.S.C. § 372a(2) is applicable only in cases where there is an Indian custom adoption, (2) Judge Burrowes erred in declining to hear evidence concerning Blackfeet tribal recognition of custom adoption, (3) the Blackfeet Tribe did not recognize custom adoption in 1935, (4) the purported adoption of the Weatherwaxes did not comply with the technical requirements of § 372a, and (5) Judge Burrowes erred in declining to admit testimony concerning decedent's intent to adopt the Weatherwaxes.

[1] In support of their argument that 25 U.S.C. § 372a(2) is applicable only to Indian custom adoptions, appellants cite the Board's initial decision in Estate of Victor Young Bear, 8 IBIA 130, 87 I.D. 311 (1980). That decision, however, was reversed on reconsideration, 8 IBIA 254, 88 I.D. 410 (1981). On reconsideration, the Board held that 25 U.S.C. § 372a(1)(c) authorized BIA Superintendents to approve, in addition to Indian custom adoptions, adoptions which had been agreed to in writing by the parties (8 IBIA at 268-269, 88 I.D. at 418).

In Young Bear, the adoption at issue took place after the effective date of 25 U.S.C. § 372a; the Board was therefore called upon to construe

§ 372a(1), which is applicable to such adoptions. In the present case, the purported adoption preceded enactment of the section and thus is ostensibly subject to § 372a(2), rather than § 372a(1). The Board has not explicitly addressed the question whether § 372a(2) applies only to Indian custom adoptions, as appellants contend.

Section 372a(2) consists of two distinct parts, a main clause and a proviso. The portion of the main clause relevant here provides for recognition of an adoption in probate proceedings where "such adoption shall have been recognized by the Department of the Interior prior to the effective date of this section." ^{4/} On its face, this provision appears to apply to any type of adoption previously recognized by the Department. The legislative history of § 372a indicates that this provision was designed "expressly to confirm adoptions which have been recognized by the Department of the Interior prior to the effective date of the act in order to prevent the passage of the act from raising a question as to their continued validity." H.R. Rep. No. 1694, 76th Cong., 3rd Sess. (1940) at 2 (letter of Secretary of the Interior submitting proposed legislation). See also S. Rep. No. 1525, 76th Cong., 3rd Sess. (1940).

The proviso to § 372a(2), by its terms, concerns only Indian custom adoptions. ^{5/} It provides that Indian custom adoptions made prior to the effective date of the section may be validated in certain circumstances by recordation with the Superintendent. This provision is clearly concerned with previously unrecorded Indian custom adoptions. The legislative history explains its effect:

Indian custom adoptions made prior to the effective date of the act and participated in by persons who are still living can be validated by recordation with a superintendent. Since it will take some time to inform the Indians of the necessity to record Indian custom adoptions before the death of one of the parties, the act will become effective 6 months after the date of its approval.

Id. An Indian custom adoption recognized by the Department of the Interior prior to the effective date of the section would fall under the main clause of § 372a(2) rather than the proviso. However, nothing in the relationship between the main clause and the proviso, in the language of § 372a in general, or in the legislative history indicates that the main clause of 372a(2) is limited to Indian custom adoptions.

The Board concludes that § 372a(2) confirms adoptions recognized by the Department prior to the effective date of the section without regard to whether they were Indian custom adoptions.

^{4/} Section 3 of the Act of July 8, 1940, provided that the statute was to become effective 6 months after the date of its approval.

^{5/} Although appellants do not point to any language in § 372a(2) in support of their argument that it applies only to Indian custom adoptions, the Board assumes they may rely in part on the language of the proviso.

Section 372a(2) does not specify any particular manner in which an adoption must have been “recognized” by the Department in order to be confirmed by the section. Undoubtedly, adoptions previously recognized in Indian probate proceedings were intended to be confirmed. However, it is apparent from the adoption document in evidence in this appeal that another method of recognizing adoptions, *i.e.*, written “acknowledgment” by a Superintendent, was in practice at the time the statute was enacted. The language of § 372a(2) is broad enough to cover adoptions recognized in this manner.

The Board concludes that the Superintendent’s acknowledgment of decedent’s adoption of the Weatherwaxes constituted recognition within the meaning of § 372a(2).

Therefore, the Board holds that § 372a(a) confirmed decedent’s adoption of the Weatherwaxes.

[2] Pursuant to § 372a, this confirmed adoption is entitled to be recognized by the Department in Indian probate proceedings. Appellants contend, however, that they are entitled to attack the written record of the adoption by submitting oral evidence concerning (1) recognition of Indian custom adoption by the Blackfeet Tribe and (2) decedent’s intent to adopt the Weatherwaxes.

Since, as the Board has held, § 372a(2) confirmed previously recognized adoptions without regard to whether they were Indian custom adoptions, testimony concerning Indian custom adoption on the Blackfeet Reservation is not relevant to this case. Further, it is clear from the legislative history of § 372a that it was the unreliability of oral evidence concerning Indian custom adoption which gave rise to the need for the legislation. The problem was described in the Secretary’s letter reprinted in the House report:

It is the present practice of this Department to recognize the so-called “Indian custom” adoption whenever sufficient evidence of the decedent’s intention exists. At one time Indian custom adoptions were by formal ceremonies, but in most tribes this ancient practice had been relaxed and it is difficult to determine whether or not an adoption was actually made in a particular case. In none of the Indian custom adoptions is there a written record and the available evidence is often confusing, conflicting, and of dubious character.

H.R. Report No. 1694 at 2. 6/ Thus, the Department proposed to replace oral evidence concerning Indian custom adoption with a written record. The

6/ The problem described in the House report is reflected in a comment made by Judge Burrowes at the Aug. 29, 1985, hearing. Responding to appellants’ offer to submit testimony concerning Blackfeet tribal recognition of custom adoption, the Judge stated, “You can find lots of people on the reservation who will argue either way. Old-timers. I’ve heard them

House report states that "[t]he broad purpose of the bill is to require that there be a written record of each adoption" and that the bill "places both the Indian and this Department in a position where in all probate cases a record will be available that will amply protect the bona fide claimant and likewise eliminate the imposter." Id.

The Board concludes that it would be inconsistent with the intent of Congress expressed in § 372a to admit oral evidence concerning Indian custom adoption for the purpose of contradicting the written record of an adoption.

The oral testimony offered by appellants concerning decedent's intent to adopt the Weatherwaxes is parol evidence of a type generally held to be inadmissible into evidence. Parol evidence is universally recognized as incompetent to prove an intent different from that expressed in a written document. See, e.g., 30 Am. Jur. 2d Evidence § 1016 (1967); 32A C.J.S. Evidence § 851 (1964). The Board concludes that admission of such evidence would conflict with the Congressional purpose in § 372a to require reliance on the written record of an adoption.

The Board holds, therefore, that Judge Burrowes correctly declined to admit appellant's evidence concerning Blackfeet tribal recognition of Indian custom adoption and decedent's intent to adopt the Weatherwaxes.

Appellants state that they also intended to offer evidence concerning the authenticity of the BIA adoption document. Parol evidence concerning the authenticity of a written document is normally admissible. 30 Am. Jur. 2d Evidence § 1035; 32A C.J.S. Evidence § 973. At the hearing, appellants presented a document entitled "Document Examination Summary," signed by a Deputy Sheriff of Cascade County, Montana, who was described by appellants as a handwriting examiner. In the summary, the Deputy stated that, in his opinion, the four signatures on the document were written by the same person. 7/ Appellants conceded at the hearing that the statement was hearsay and that they were not prepared at that time to present expert testimony concerning the signatures.

Appellants should have been prepared to present their expert testimony. Having failed to present evidence at the hearing, they would normally not be entitled to pursue the matter on appeal. E.g., Estate of Ella Dautobi, 15 IBIA 111 (1987). However, the hearing transcript reflects some uncertainty as to whether another hearing might be required, and appellants could have concluded that they would have another opportunity to present their evidence.

fn. 6 (continued)

right here in this room, both ways" (Tr. at 18). Thus it appears that, at least on the Blackfeet Reservation, the problem of conflicting evidence concerning Indian custom adoption still exists.

7/ To an untrained eye, the signatures appear quite different.

The authenticity of the adoption document in this case is a critical matter, because proof of the adoption at issue, pursuant to 25 U.S.C. § 372a(2), depends entirely upon the written record. Therefore, in order to foreclose the possibility that a manifest injustice might occur, the Board concludes that it should exercise the inherent authority of the Secretary pursuant to 43 CFR 4.320 and remand this case for the limited purpose of a determination concerning the authenticity of the adoption document.

On remand, appellants bear the burden of proving that the document is not authentic. As a document signed by a BIA official and maintained as a BIA record, it is entitled to a presumption of regularity. 29 Am. Jur. 2d Evidence §§ 171-174; 31A C.J.S. Evidence § 146. Unless appellants can show by a preponderance of the evidence that the signatures on the document are not those of the parties whose signatures they purport to be, or that there is some other convincing evidence of inauthenticity, the document must be found authentic.

Finally, appellants argue that the adoption of the Weatherwaxes failed to comply with the technical requirements of § 372a. Appellants refer to various provisions of § 372a(1) and the proviso to § 372a(a). None of these provisions are relevant to the adoption at issue here because, as discussed above, decedent's adoption of the Weatherwaxes was subject to the main clause of § 372a(2). Appellants have not shown that the adoption is invalid for failure to conform to the requirements of § 372a.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, Judge Burrowes' January 13, 1988, order after reopening is affirmed in part. The case is remanded for a determination concerning the authenticity of the April 24, 1935, adoption document.

Anita Vogt
Administrative Judge

I concur:

Kathryn A. Lynn
Chief Administrative Judge